RANHILL E&C SDN BHD v. THYSSENKRUPP INDUSTRIES (M) SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG J
[CIVIL SUIT NO: 22C-55-11-2015]
21 MARCH 2016

CONTRACT: *Guarantee – Bank guarantee – Call on bank guarantee – Injunctive reliefs to prevent call on guarantees – Whether plaintiff's works completed according to specifications – Whether defendant provided concrete reason for calling on bank guarantee – Whether plaintiff established prima facie case of unconscionability*

CIVIL PROCEDURE: *Injunction – Interlocutory injunction – Application to prevent call on bank guarantees – Whether plaintiff established prima facie case of unconscionability*

CIVIL PROCEDURE: *Injunction – Erinford injunction – Application pending appeal – Whether appeal would be rendered nugatory if injunction not ordered – Whether application for Erinford injunction ought to be allowed*

Alstom Services entered into an agreement with Thyssenkrupp Industries ('D1') to provide, amongst others, services of erection ('the works') for a power plant construction project ('the project'). D1 then appointed the plaintiff to undertake the works for the project for a total price of RM24.5 million ('the contract sum') *vide* a letter of intent. This was followed by a work order providing for the scope of works to be carried out ('the work order'). The letter of intent and the work order which provided for the initial scope of works to be done formed salient parts of the contract between the plaintiff and D1. It was a term of the contract that D1 was to provide an advance payment in the sum of RM2,450,000 to the plaintiff being 10% of the contract sum for the commencement of the initial scope of works by the plaintiff ('the advance payment'). The advance payment was to be made *vide* a bank guarantee ('BG') in favour of D1. The BG was to remain valid until the expiry of 90 days beyond the completion of the plaintiff's scope of works. The plaintiff experienced difficulties in completing its initial scope of works. Therefore, the plaintiff and D1 entered into an agreement wherein the balance of the initial scope of works would be de-scoped and awarded directly to the plaintiff's sub-contractors. The plaintiff's obligation was then reduced accordingly ('the new scope of works'). D1 however argued that the plaintiff had abandoned the works and that the progress for the works done by the plaintiff was only 32.26%. Since the work had stopped, there was a problem that the balance advance payment would not be recoverable if not by a demand made on the BG. The plaintiff proceeded from their understanding that since the plaintiff's project works had been performed, there was no longer any obligation to maintain the BG. Therefore, the plaintiff sought from D1 the outstanding claims for the additional works

and/or variations. *Vide* encl. 11, the plaintiff, *inter alia*, obtained an (i) *ex parte ad interim* injunction restraining, amongst others, D1 from receiving and/or dealing with any money from the BG for the advance payment; and (ii) an *ex parte ad interim* injunction restraining, amongst others, the second defendant ('D2') from making any payment under the BG to D1. The first issue that arose for determination in the *inter partes* hearing of encl. 11 was whether the *ex parte* injunction restraining D1 from receiving the sum of RM2.45 million under the BG issued by D2 and restraining D2 from paying out to D1 the said sum, should be confirmed, discharged or varied. The second issue that arose for determination was, if the *inter partes* hearing of encl. 11 was varied, whether the plaintiff's *Erinford* injunction application *vide* encl. 34 ought to be allowed.

Held (varying plaintiff's *ex parte* order in encl. 11; allowing plaintiff's application in encl. 34):

(1) The ambit and scope of the BG and the title to the BG being a 'Bank Guarantee for Advance Payment' both clarified and confirmed what the BG was for. The whole purpose of the BG was to secure the repayment of the advance payment made at the commencement of the works. Both the background and backdrop for the issuance of the BG could not be discarded and dismissed. The purpose could not be extended to the performance of the contract generally as that was not the intention of the parties at the outset. It could not be allowed to obscure the obvious merely because it was couched in absolute and all-encompassing terms. (paras 19 & 27)

(2) There was no contractual condition that D1 must give prior notice in writing to the plaintiff before the call on the BG was made. D1 had also explained why it was constrained to call on the BG and pointed out the plaintiff's various defaults in the completion of the works. With the BG expiring round the corner, it could hardly be said that D1 was proceeding surreptitiously or that there was something sinister or suspicious in D1's conduct to call on the BG. It was more a case where any negotiations between the plaintiff and D1 had reached an impasse. D1 could hardly be faulted to call on the BG and there was nothing unconscionable in the circumstances in which the call was made. (para 30)

(3) Since the BG was particularly for securing the advance payment made by D1 to the plaintiff, the demand could not, however, be for the whole amount, though, D1 had indicated that it would be claiming from the plaintiff the sum of RM8.45 million arising out of the failure of the plaintiff to complete both the initial scope of works and the new scope of works. As the BG was for a sum not exceeding RM2.45 million, the court was entitled to vary the *ex parte* injunction obtained to restrain the payment out by D2 to D1. (para 34)

(4) The fact that D1 is a foreign entity providing a service here, should not be a penalising factor. The plaintiff having enjoyed the benefit of the advance payment and the payments made in advance could not now argue that their lack of known assets within jurisdiction would tilt the balance of convenience in the plaintiff's favour. (para 56)

(5) The *ex parte* injunction is varied such that D1 was restrained from receiving a sum exceeding the sum of RM1,591,523.52 from the demand it made on the BG and that D2 be correspondingly restrained from so releasing. The sum of RM1,591,523.52 shall be released to D1's solicitors on record as stakeholders and the same shall be placed in the clients' account of the said solicitors earning interest until the disposal of the suit. (para 59)

(6) A call on the BG and the execution of the call could not be reversed in the event the plaintiff was successful on appeal and that an injunction was granted to restrain the execution of the call. By then the horse would have bolted so to speak and the BG would have been exhausted. The sum secured would have been paid out. From that perspective, it could be said that the appeal if successful would be nugatory and that the plaintiff's victory upon a successful appeal would be pyrrhic and purely academic save for damages for a wrongful call on the BG. Therefore, the court would be inclined to maintain the *status quo ante* and to grant the *Erinford* injunction subject to terms. The *Erinford* injunction would be until the disposal of the appeal or the disposal of the trial of this case whichever is earlier. (paras 66, 75 & 77)

Case(s) referred to:

American Cyanamid Co v. Ethicon Ltd [1975] 1 All ER 504 ***(refd)***

Cobrain Holdings Sdn Bhd v. Expertise International A&I (M) Sdn Bhd & Ors [2015] 6 CLJ 312 HC ***(refd)***

Cocoa Processors Sdn Bhd v. United Malayan Banking Corp Bhd & Ors [1989] 1 CLJ 183; [1989] 1 CLJ (Rep) 436 HC ***(refd)***

Erinford Properties Ltd v. Cheshire County Council [1974] 2 All ER 448 ***(refd)***

Karya Lagenda Sdn Bhd v. Kejuruteraan Bintai Kindenko Sdn Bhd & Anor [2007] 6 CLJ 18 CA ***(refd)***

Kejuruteraan Bintai Kindenko Sdn Bhd v. Nam Fatt Construction Sdn Bhd & Anor [2011] 7 CLJ 442 CA ***(refd)***

Kilang Kosfarm Sdn Bhd v. Kosma Nusantara Bhd (No. 2) [2002] 3 CLJ 165 HC ***(refd)***

Malaysian Refining Company Sdn Bhd v. Sumatec Engineering And Construction Sdn Bhd [2011] 7 CLJ 21 CA ***(refd)***

Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals [2008] 2 CLJ 1 FC ***(refd)***

Sumatec Engineering And Construction Sdn Bhd v. Malaysian Refining Company Sdn Bhd [2012] 3 CLJ 401 FC ***(refd)***

For the plaintiff/applicant - John Skelchy, Vishal Kumar & Hilwa Bustam; M/s James Monteiro
For the 1st defendant/respondent - AS Gill; M/s AS Gill & Salina
For the 2nd defendant/respondent - Nabila Kamarudin; M/s Christopher & Lee Ong

Reported by Sandra Gabriel

JUDGMENT

Lee Swee Seng J:

[1] This is an *inter parte* hearing in encl. 11 as to whether the *ex parte* injunction restraining the first defendant ("D1") from receiving the sum of RM2.45 million under a bank guarantee issued by the second Defendant Malayan Banking Berhad ("D2") and restraining D2 from paying out to D1 the said sum, should be confirmed, discharged or varied.

The Project

[2] A company known as Tanjung Bin Energy Issuer Bhd Malaysia ("TBEI") was tasked to administer and manage the construction of a 1,000 Megawatt power plant located at Tanjung Bin Johor ("the project"). TBEI in turn appointed Alstom Services Sdn Bhd ("Alstom Services") to provide services of erection, commissioning and testing of a coal handling plant ("the works").

[3] Alstom Services thereafter entered into an agreement with the D1 wherein it was to carry out the works. D1 is a wholly owned subsidiary of Thyssenkrupp Industries India Pty Ltd and was incorporated on or around 15 August 2012.

[4] D1 then appointed the plaintiff to undertake the works for the project for a total price of RM24.5 million ("the contract sum") by its letter of intent dated 12 April 2013. The letter of intent set out the initial scope of works required to be carried out by the plaintiff in respect of the project. This was followed by a work order W.O. No. TK(M)-3M0037-PO-002 dated 15 May 2013 to the plaintiff in respect of the scope of works to be carried out ("the work order").

[5] The letter of intent, the work order together with the commercial terms and conditions dated 9 April 2013 ("the terms and conditions") formed the salient parts of the contract between the plaintiff and D1. The initial scope of works included unloading at site, handling, storage till erection, erection, testing, commissioning and supervision ("the initial scope of works").

[6] It was a term of the contract that D1 was to provide an advance payment in the sum of RM2,450,000 to the plaintiff being 10% of the contract sum for the commencement of the initial scope of works by the

plaintiff ("the advance payment"). The advance payment was to be made against the submission of a bank guarantee in favour of D1. Under annexure 1 of the terms and conditions, the bank guarantee which was to secure the advance payment, was to remain valid until the expiry of 90 days beyond the completion or performance of the plaintiff's scope of works.

[7] It should also be mentioned that the subsequent 80% of the order value shall be paid to the plaintiff progressively against monthly progressive reports and bills as certified by D1 and after 30 days from the date of submission of documents by the plaintiff to D1. In respect of the last 10% of the order value, the plaintiff is entitled to payment upon (i) the completion of their works as signified by a performance guarantee test (as defined in the contract) carried out by the plaintiff; and (ii) upon the provision of a bank guarantee for the value of the last 10% of the order value which was to be valid up to 30 April 2018. For the avoidance of doubt and confusion, this bank guarantee is separate and distinct from the bank guarantee for the advance payment. The bank guarantee ("BG") for the advance payment dated 3 June 2013 was duly furnished by the plaintiff to D1; being issued by D2 to D1.

Problems

[8] The plaintiff experienced various difficulties which it said was beyond its control in completing its initial scope of works. Seeing that the plaintiff was falling behind its schedule of works, the plaintiff and D1 entered into an agreement wherein the balance of the initial scope of works of the plaintiff would be de-scoped and awarded directly to the plaintiff's subcontractors. The plaintiff's obligation would then be reduced accordingly ("the new scope of works") as captured in D1's letter to the plaintiff dated 7 November 2014.

[9] According to the plaintiff, it had to the best of its ability performed the new scope of works up until February 2015 when for reasons best known to D1, D1 had wrongfully and/or in bad faith restricted and/or denied the plaintiff access to the project site, thus preventing the plaintiff from carrying out any further works.

[10] D1's version is that the plaintiff had abandoned the works in late September 2014. See para. 21(c) encl. 23 and exh. P8. At the time the plaintiff abandoned the works, the progress for the works by the plaintiff was only 32.26% as evidenced by exh. P 11 in encl. 23. This is the plaintiff's own document annexed to its statement of claim. As can be seen up to claim no. 16 dated 29 December 2015 the total progress of the works stood at 32.36%.

[11] The advance payment had been deducted from every progress claim by deduction of 10% of the amount payable. The work, having stopped, there was the problem that the balance advance payment would be not recoverable

A if not by a demand made on the bank guarantee. The plaintiff had at the request of D1 extended the bank guarantee on two previous occasions to 12 August 2015 and then further to 12 November 2015.

[12] The plaintiff proceeded from their understanding that since the plaintiff's project works have been performed, there is no longer any
B obligation to maintain the bank guarantee which was expiring on 12 November 2015 nor any entitlement by D1 to call on the same. The plaintiff wrote as such to D1 by its letter of 4 November 2015 seeking also a resolution in respect of the plaintiff's outstanding claims for additional works and/or variations.

C

[13] D1 had written to the plaintiff by their letter dated 3 November 2015 (exh. P18 encl. 28) stating categorically that the plaintiff had failed to perform the work order as evidenced by various communications between the parties in the past. D1 reiterated that the delay in the erection works was on account of the plaintiff's inability to mobilise the agreed resources in time
D and this was in spite of the additional financial support from D1 in making payments in advance of the work to be done at the request of the plaintiff to ease their financial burden. D1 impressed upon the plaintiff that they had paid them a sum of RM9.2 million in spite of the plaintiff not completing their scope of works. In summary D1 informed the plaintiff that they have
E incurred RM32.95 million till date to complete the scope of work in the work order of RM24.5 million, the difference being RM8.45 million, which is their financial loss purely attributable to the plaintiff inability to perform the work order. The letter ended with the cryptic note that they were thus constrained to invoke the BG.

F **Prayers**

[14] The plaintiff rushed to court with a certificate of urgency and obtained on 11 November 2015 an *ex parte* injunction in encl. 11 on the following terms:

G (i) that parties are to appear on 16 December 2015 at 9am for the hearing of the application;

(ii) that an *ad interim* order is granted that the first defendant and/or their servants and/or their agents or otherwise are restrained and an ad interim injunction is granted restraining them and each of them from
H receiving and/or dealing with any money from the call on the Malayan Banking Berhad's Bank Guarantee for Advance Payment No. 99140BGF5966287 until the disposal of the hearing on 16 December 2015; and

I (iii) that an ad interim order is granted that the second defendant and/or their servants and/or their agents or otherwise are restrained and an *ad interim* injunction is granted restraining them and each of them from

making any payment whatsoever under the bank guarantee to the first defendant or otherwise until the disposal of the hearing on 16 December 2015.

[15] The *ad interim* injunction was extended by consent of the parties and finally fixed for disposal on an *inter parte* hearing before me on 24 February 2016.

Whether The BG Is An Unconditional On Demand BG

[16] The operative words of the BG issued by the bank D2 in favour of D1 read as follows:

Bank Guarantee For Advance Payment

WHEREAS THYSSENKRUPP INDUSTRIES (M) SDN. BHD., a company existing under the laws of Malaysia, having its registered office at No. 656, 2nd Floor, 4th Mile, Jalan Ipoh 51200, Kuala Lumpur, Malaysia (hereinafter called the 'Company') which expression shall unless repugnant to the context include its successors and permitted assigns have received order from ALSTOM SERVICES SDN BHD for on-shore activities including but not limited to THE ERECTION AND COMMISSIONING OF THE COAL HANDLING PLANT FOR 1X100 MW POWER PLANT FOR TANJUNG BIN PROJECT AT MALAYSIA.

WHREAS M/S RANHILL E & C SDN BHD having its office at Level 14, Wisma Perkeso, No. 155, Jalan Tun Razak, 50400 Kuala Lumpur (hereinafter referred to as the 'Contractor') which expression shall unless repugnant to the context includes its successors, administrators, representatives and permitted assigns have approached the Company and offered to undertake THE ERECTION, COMMISSIONING, COLD TRIALS, HOT TRIALS, PG TEST, SUBSTANTIAL COMPLETION & HANDING OVER TO CLIENT OF COAL HANDLING PLANT FOR 1+1X1000MW COAL FIRED POWER PLANT, TANJUNG BIN, JOHOR MALAYSIA (hereinafter referred to as the 'Works and Services') as per the requirements of the Company.

WHEREAS the Company has accepted the offer of the Contractor for providing the works and services for the said Tanjung Bin, Malaysia Project, and have placed their Order No. TKI(M)/3M0037/PO-002 dated 15 May 2013 (hereinafter called the 'Contract') for the scope of Work as detailed in the contract at the price on the terms and subject to the conditions contained in the said contract.

WHEREAS the Contractor has agreed to comply with all the terms and conditions of the said contract.

WHEREAS according to the terms of the said contract the Contractor is required to provide a Bank Guarantee for RM2,450,000.00 (RINGGIT MALAYSIA TWO MILLION FOUR HUNDRED FIFTY THOUSAND

ONLY) being 10% mobilisation advance of the Contract price, before the Company makes an advance payment of RM2,450,000.00 (RINGGIT MALAYSIA TWO MILLION FOUR HUNDRED FIFTY THOUSAND ONLY), in the form set out by the Company.

And whereas BEFORE THE ADVANCE PAYMENT AS AFORESAID IS MADE, THE Bank has at the request of the Contractor agreed to give its Guarantee as herein contained.

NOW THIS WITNESSETH AS FOLLOWS:

In consideration of the Company agreeing to make an advance payment of RM2,450,000.00 (RINGGIT MALAYSIA TWO MILLION FOUR HUNDRED FIFTY THOUSAND ONLY), we, MALAYAN BANKING BERHAD (3813-K), KUALA LUMPUR TRADE FINANCE CENTRE, LEVEL 8, MENARA HAP SENG, JALAN P. RAMLEE, 50250 KUALA LUMPUR, (hereinafter referred to as 'Bank') which expression shall unless repugnant to the context include its successors and assigns, do hereby unconditionally and irrevocably undertake to pay to the Company merely on first demand and without any demur an amount not exceeding RM2,450,000.00 (RINGGIT MALAYSIA TWO MILLION FOUR HUNDRED FIFTY THOUSAND ONLY) for any delay, default or failure on the part of the Contractor in complying the obligations and responsibilities undertaken by the Contractor or against any loss or damage or costs caused to or suffered by or that may be caused or suffered by the company by reasons of any delay, default or failure on the part of the Contractor to fulfil either wholly or in part or breach by the Contractor of any of the terms and conditions contained in the said contract and in the event the Contractor shall make any delays or defaults in carrying out any of the Works and Services under the said contract or otherwise in the observance and performance of any of the terms and conditions relating thereto in accordance with the true meaning and intent thereof.

We, Bank do hereby undertake to make payment on first demand, without any demur and without recourse to the Contractor of such sum or sums not exceeding RM2,450,000.00 (RINGGIT MALAYSIA TWO MILLION FOUR HUNDRED FIFTY THOUSAND ONLY) as may be claimed by the Company, without requiring the Company to invoke any legal remedy that may be available to it to compel the Bank to pay the same or to compel such performance by the Contractor.

Notwithstanding anything to the contrary the decision of the Company as to whether the Contractor has committed any breach of the terms and conditions of the said contract and the extent of loss, damages, costs charges and expenses caused to or suffered by or that may be caused or suffered by the Company from time to time and the amount or amounts to which the Company is entitled by reason thereof will be final, conclusive and binding on the Bank and the Bank shall not be entitled to ask the Company to establish its claim or claims under this Guarantee

A

but will pay the same on demand without any objection, and it shall not be open to the Bank to know the reason of or to investigate or to go into the merits of the demand or to question or to challenge the demand or to know any facts connected with the demand and the Bank shall not require any proof of liability of the Contractor to pay the amount to the Company.

B

The right of the Company to recover from the Bank any amount under this Guarantee shall not be affected or suspended by reason of the fact that the dispute or disputes have been raised by the Contractor with regard to their liability or the proceedings are pending before tribunal/arbitrators/court, with regard thereto or in connection therewith.

C

[17] As is evident from the clear and unambiguous words employed, the obligation of D2 as the bank issuing the BG in favour of D1 is to pay the sum not exceeding the sum of RM2.45 million on a mere demand for it clearly says: "... do hereby unconditionally and irrevocably undertake to pay to the company merely on first demand and without any demur an amount not exceeding RM2,450,000 ..." The words of the BG are no different from many unconditional and "on demand" guarantee that have come before the courts for decision. One need to go no further than to refer to the Court of Appeal case of *Karya Lagenda Sdn Bhd v. Kejuruteraan Bintai Kindenko Sdn Bhd & Anor* [2007] 6 CLJ 18 where His Lordship Raus Sharif JCA (now PCA) spoke emphatically as follows:

D

E

[9] The learned High Court Judge ruled that the bank guarantee dated 27 June 2003 issued by the plaintiff in favour of the second defendant is an unconditional guarantee or "on demand bond" and all that is required to activate it is a written demand by the second defendant. The learned High Court Judge rejected the argument of the necessity for the second defendant to prove default on the part of the first defendant in performance of the building contract. We are in agreement with the learned High Court Judge. It is our judgment that the bank guarantee is a performance bond. Whether a performance bond is conditional or unconditional must depend on the terms of the bond itself (*Teknik Cekap Sdn. Bhd. v. Public Bank Berhad* [1995] 4 CLJ 697). In the present case, the relevant clause of the bank guarantee read as follows:

F

G

> **If the contractor**, unless relieved from the performance by any clause of the contract or by statute or by the decision of a tribunal of competence jurisdiction, **shall in any respect fail to perform under the contract or commit any breach of his obligation thereunder, then the guarantor shall pay to the principal** up to a total aggregate sum not exceeding the amount of RINGGIT MALAYSIA TWO MILLION SEVENTY FIVE THOUSAND SEVEN HUNDRED AND SEN NINETY FOUR ONLY (RM2,075,700.94) on the **principal's demand notwithstanding any contestation of protest by the contractor or by the guarantor or**

H

I

A **by any third party**, provided always that the total of all partial demands so made shall not exceed the aggregate sum of RINGGIT MALAYSIA TWO MILLION SEVENTY FIVE THOUSAND SEVEN HUNDRED AND SEN NINETY FOUR ONLY (RM2,075,700.94) and the guarantor's liability to pay the principal as aforesaid shall correspondingly be reduced
B proportionate to any partial demand having been made as aforesaid. (emphasis added)

[10] It is our judgment the above clause is a clear indication that the bank guarantee is an unconditional and "on demand" bank guarantee. Payment should therefore be effected by the plaintiff notwithstanding any
C contestation by the first defendant or the plaintiff when a valid demand is made by the second defendant. In this case there is no dispute that several demands were made by the second defendant, claiming from the plaintiff for the full sum of the bank guarantee amounting to RM2,075,700.94 due to non-performance of the building contract.

D [11] We are of the view, since the bank guarantee was an unconditional and "on demand" bank guarantee, there is no necessity for the demand letter as contended by the first defendant to expressly assert that the first defendant had failed to perform or breached the underlying building contract. Hence, the High Court Judge's finding on this issue is not erroneous.

E [12] In fact the wording of the bank guarantee in the present case is identical to the wording or performance bonds/bank guarantees that have come before the courts. (*Syarikat Perumahan Pegawai Kerajaan Sdn Bhd v. Bank Bumiputra Malaysia Bhd* [1990] 2 CLJ 1052; [1990] 3 CLJ (Rep) 159, *Cygal Bhd v. Bandar Subang Sdn Bhd* [2004] 3 CLJ 67, *Hermis Interco BV Sdn Bhd v. Syarikat Pembinaan Hashnudin Sdn Bhd* [1986] 1 MLJ 245, *HSH*
F *Engineering & Construction Sdn Bhd v. Belton properties Sdn Bhd & Anor* [2001] 2 CLJ 186 and *LEC Contractors (M) Sdn. Bhd. v. Castle Inn Sdn Bhd & Anor* [2000] 3 CLJ 473). In all these cases the courts have consistently held that such guarantee/bond is an 'unconditional bond' or an 'on demand bond'. We have no reason to interpret differently.

G **[18]** The business community knows the significance and more importantly the strength of a bank guarantee. It is what it says it will do and no less than a licensed bank declaring that it will pay upon demand. It is a separate contract between the bank and the beneficiary of the guarantee. It is apart from the underlying contract between the beneficiary and its contracting
H party. Sure there are exceptions where a bank for example that had given such a guarantee might be restrained from making payment upon a demand being made on it to pay. It is the kind of exception that underscores the general rule; the general rule being payment made forthwith upon demand without demur, protestation, proof of damage and the like.

I

[19] Here for instance D1 would like the court to believe that though the BG was issued in the context of the requirement of cl. 19.1 of the contract to secure the payment back of the advance payment made by D1 to the plaintiff, it was actually wide enough to cover any failure of performance of the contract by the plaintiff. However we cannot ignore the context here as the context both circumscribe and confine the ambit and scope of the BG and the title to the BG being a "Bank Guarantee For Advance Payment" both clarify and confirm what the BG is for. Both the background and backdrop for the issuance of the BG cannot be discarded and dismissed. The purpose cannot be extended to the performance of the contract generally as that was not the intention of the parties at the outset and so it cannot be allowed to obscure the obvious merely because it is couched in absolute and all-encompassing terms.

[20] Having held that the BG is for securing the advance payment and not something else, the question to be considered next is whether the beneficiary D1 here may make a demand for the whole sum guaranteed of RM2.45 million.

Whether The Demand Of D1 On The BG Is Unconscionable

[21] The law on payment out under a banker's guarantee or performance bond has developed to now allow a restrain on such payment out on ground not only of fraud but also of unconscionability as well. The watershed case is that of the authoritative pronouncement of the Federal Court in *Sumatec Engineering And Construction Sdn Bhd v. Malaysian Refining Company Sdn Bhd* [2012] 3 CLJ 401; [2014] 4 MLJ 1. The Federal Court speaking through His Lordship Hamid Embong FCJ, endorsed the approach taken by the Court of Appeal as follows:

> [17] The Court of Appeal used the following tests and principles in coming to its conclusion, in determining the issue at hand as found in the following passages from its judgment:
>
> (i) The principle concerning 'unconscionability' was initially propounded by Lord Denning in the case of *Lloyds Bank v. Bundy* [1975] QB 326 where it was held that unconscionable transaction between parties may be set aside by the court of equity. This 'unconscionable' category is said to extend to all cases where **unfair advantage has been gained by an unconscientious use of power by a stronger party against a weaker** (see also *Halsbury's Law of England*, (3rd Ed), Vol 17 [1956] at p 682).
>
> (ii) On an application for relief against unconscionable conduct, the court looks to the conduct of the party attempting to enforce, or retain benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so (see *Commercial Bank of Australia Ltd v. Amadio and Another* [1983] 46 ALR 402).

A (iii) In the Singapore High Court, Lai Kew Chai J in the case of *Min Thai Holdings Pte Ltd v. Suniable Pte Ltd & Anor* [1999] 2 SLR 368 opined that '**the concept of unconscionability involves unfairness**, as distinct from dishonesty or fraud, or conduct so reprehensible or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party'.

B (iv) It is not possible to define 'unconscionability' other than to give some very broad indications such as lack of *bona fides*. **What kind of situation would constitute 'unconscionability' would have to depend on the facts of each case**. This is a question which the court has to consider on each occasion where its jurisdiction is invoked. C There is no pre-determined categorisation (see *Dauphin Offshore Engineering and Trading Pte Ltd v. The Private Office of HRH Sheikh Sultan bin Khadifa bin Zayed Al-Nahyan* [2000] 1 SLR (R) 117; and *Shanghai Electric Group Co Ltd v. PT Merak Energi Indonesia* [2010] 2 SLR 329)

D (v) Based on the above considerations, we are of the view that there is no simple formula that would enable the court to ascertain whether a party had acted unconscionably in making a call on an on demand performance bond or bank guarantee. In the final analysis, whether or not 'unconscionability' has been made out is **largely dependent on the facts or each case**. In every case where E 'unconscionability' is made out, there would always be **an element of unfairness or some form of conduct which appears to be performed in bad** faith.

(vi) In *Bocotra Construction Pte Ltd v. AG* [1995] 2 SLR (R) 262, the Singapore Court of Appeal, stated that 'a higher degree of strictness applies, as F **the applicant will be required to establish a clear case of fraud or unconscionability in the interlocutory proceedings**. It is clear that mere allegations are insufficient'.

...

[39] We are of the considered view that the 'seriously arguable and G realistic inference' test as used by the learned judicial commissioner in *Focal Asia* is equally applicable to the extended exception of unconscionability. That test therefore needs to be applied to the relevant material facts before the court. The same test which results in a 'strong *prima facie* case' was utilised by the Court of Appeal at the intermediate appeal stage. And the Court of Appeal said this of the required burden H now rested on the shoulder of Sumatec:

> *As in the case of fraud, to establish 'unconscionability' there must be placed before the court manifest or strong evidence of some degree in respect of the alleged unconscionable conduct complained of, not a bare assertion. Hence, the respondent has to satisfy the threshold of a seriously arguable case that* I *the only realistic inference is the existence of 'unconscionability' which would basically mean establishing a strong prima facie case*. In other words, the

> respondent has to place sufficient evidence before the court so as to enable the court to be satisfied, not necessarily beyond reasonable doubt, that a case of 'unconscionability' being committed by the beneficiary (the appellant) has been established to an extent sufficient for the court to be minded to order injunction sought. This additional ground of 'unconscionability' **should only be allowed with circumspect where events or conduct are of such degree such as to prick the conscience of a reasonable and sensible man**. (emphasis added)

[22] In *Kejuruteraan Bintai Kindenko Sdn Bhd v. Nam Fatt Construction Sdn Bhd & Anor* [2011] 7 CLJ 442 it was observed as follows:

> [61] A performance bond is basically a form of security for the performance of the underlying contract between the parties. Usually the underlying contract between the parties provides for the requirement of a performance bond to be issued by a bank for the benefit of the beneficiary in the event of non-performance of the other party of the contractual obligations between them. The underlying purpose of a performance bond is to provide a security which is to be readily, promptly and assuredly realisable when the prescribed event occurs, as stipulated in the underlying contract.
>
> [62] On the one hand a beneficiary under a performance bond should be protected as to the integrity of the security he has in case of non-performance by the party on whose account the performance bond was issued. On the other hand, a performance bond can be used as an oppressive instrument. And in the event that a beneficiary calls on the performance bond in circumstance where there is *prima facie* evidence of fraud or unconscionability, the court should step in to intervene at the interlocutory stage to restrain him from making such a call until the whole matter had been investigated and determined (see: *GHL Pte Ltd v. Unitrack Building Construction Pte Ltd (supra)*.

[23] Admittedly, it is easier to discern what is "unconscionable" than it is to define it; easier to see it when it is there than to spell it out.

[24] Applying the enunciation of the additional ground of "unconscionability" to the factual matrix of this case, the question is whether the beneficiary D1 could be said to have acted unconscionably in calling on the BG.

[25] The plaintiff admits that under the contract, D1 made an advance payment to the plaintiff of RM2.45 million after the plaintiff had furnished a BG for the said sum from D2 to D1. This sum was for the express purpose of helping the plaintiff to mobilise its staff to the site to commence the works. There is no doubt that this sum advanced has to be repaid and the repayment was made by deducting 10% from every certificate of progress billing as can be seen from the plaintiff's own document attached to its statement of claim marked as attachment 1 and summarised below as follows:

Attachment 1

Invoice No.	Date	Total Amount (RM)	100% of Total Amount (RM)	Comp-letion	Less Advance 10%	Less Retention 10%	Net Payable Amount
1	31.10.2013	360,390.34	450,487.93	1.84%	45,048.79	45,048.79	360,390.34
2	25.11.2013	226,459.73	283,066.65	1.16%	28,307.46	28,307.46	226,459.73
3	22.01.2014	279,995.08	349,993.85	1.43%	34,999.38	34,999.38	279,995.0
4	08.02.2014	218,183.26	272,729.08	1.11%	27,272.91	27,272.91	218,183.26
5	05.03.2014	154,963.13	193,703.91	0.79%	19,370.39	19,370.39	154,963.13
6	21.03.2014	186,793.99	233,492.49	0.95%	23,349.25	23,349.25	185,793.99
7	25.04.2014	349,458.91	436,823.63	1.78%	43,682.36	43,682.36	349,458.91
8	28.04.2014	515,000.00					515,000.00
9	31.05.2014	533,086.70	666,358.38	2.72%	66,635.84	66,635.84	533,086.70
10	02.07.2014	698,536.77	873,170.97	3.56%	87,318.10	87,319.10	698,536.77
11	24.07.2014	566,007.97	707,509.96	2.89%	70,751.00	70,751.00	566,007.97
12	05.09.2014	815,987.00	1,019,984.00	4.16%	101,998.00	101,998.00	815,987.00
13	08.09.2014	284,013.00					284,013.00
14	02.10.2014	798,686.00	998,357.00	4.07%	99,836.00	99,836.00	798,686.00
15	12.11.2014	788,534.00	985,667.00	4.02%	98,567.00	98,567.00	788,534.00
16	29.12.2014	368,727.00	460,909.00	1.88%	46,091.00	46,091.00	368,727.00
17	31.12.2014	264,953.00					264,953.00
18	09.01.2015	521,997.00	652,496.00	2.66%	65,250.00	62,250.00	521,997.00
1 A/W	06.02.2015	3,845,205.00					3,845,205.00

[26] From the plaintiff's own summary of invoices, payments received and the percentage of works completed, it can be seen that as at Invoice No. 16 dated 29 December 2014, only 32.36% of the works have been completed. The total amount recouped from the 10% deducted for each of the invoices issued was only RM858,725. It becomes plain obvious that D1 is not going to recover the whole of the RM2.5 million made to the plaintiff as advance payment.

[27] The whole purpose of the BG is to secure the repayment of advance payment made at the commencement of the works as provided for in cl. 19.1 of the contract. The plaintiff had abandoned the works in late September 2014 (exh. P8 encl. 23). When requested by D1, the plaintiff extended the BG due to expire on 12 May 2015 to 12 August 2015. Before the expiry of the first extension of the BG, D1 wrote to the plaintiff by its letter of 6 August 2015 stating that the extension was necessary "Since contractual obligations against our above order are yet to be fulfilled." There was another extension to 12 November 2015 (second extension).

[28] Before the expiry of the second extension, the plaintiff wrote to D1 by letter dated 4 November 2015 expressing its utter disappointment with D1 for not paying the sum of RM3,845,205 which the plaintiff said was due under Invoice 1 A/W dated 6 February 2015 for addition/variation works done which it said D1 had wholly refused, failed and/or neglected to approve or make payment for these works. See exh. HKK 15 in encl. 11. It expressed in no uncertain terms that "Any requirement for further extension of the banker guarantee or even a call on the same would certainly amount to unconscionable conduct on your part as that would on top of already depriving us of the RM3,845,205, seek to cause further financial damage to us and further unjustly enrich yourself." The plaintiff did not raise any objections to both the first and second extensions of the BG. D1 contended that the plaintiff is now estopped from contending that their contract had been completed or that any request for further extension would be unconscionable.

[29] Perhaps D1 had gotten wind of this and so by their letter dated 3 November 2015 to D2, having received no indication that the BG would be extended, it proceeded cautiously to call on the BG before it expired on 12 November 2015. It reads as follows:

ThyssenKrupp Industries (M) Sdn Bhd

Malayan Banking Berhad (3813-K)
Kuala Lumpur Trade Finance Centre
Level 8, Menara Hap Seng
Jalan P. Ramlee
50250 Kuala Lumpur By Speed Post/Courier/Hand Delivery

5207/COMM/SSK/504639 03.11.2015

Reg: Invocation of Advance Bank Guarantee No.99140BGF5966287 dated 03.06.2013 executed by you on behalf of Ranhill E & C Sdn. Bhd.

Ref.: Our Order No. TK(M)/3M0037/PO-002 dated 15.05.2013
Our Letter No. 5207/COMM/SSK 503567 dated 06.08.2015
Our Letter No. 5207/COMM/SSK 504056 dated 22.09.2015

Dear Sir,

We have lodged our claim under the above referred letters and have asked you either to extend the Bank Guarantee or remit us the amount of Bank Guarantee by way of Demand Draft.

Since we have neither received the extension nor the amount of Bank Guarantee and Ranhill E & C Sdn. Bhd., has neglected and failed to comply with their contractual obligations against our above stated Order, we now call upon you to make immediate payment of the full amount of the abovementioned bank guarantee of RM2,450,000.

In case you fail or neglect to effect payment to us immediately, you will be liable and we will be entitled to interest @ 18% p.a. on the amount of the Bank Guarantee from the date the amount is due up to the date of final payment.

Please arrange for immediate remittance.

Thanking you,

Yours faithfully,

THYSSENKRUPP INDUSTRIES (M) SDN. BHD.

- signed -

[30] The plaintiff submitted that D1's action in calling on the BG without prior notice to the plaintiff is an indication of their bad faith and unconscionable conduct. In the first place there is no contractual condition that D1 must give a prior notice in writing to the plaintiff before the call on the BG is made. Secondly, D1 had by their letter dated 5 November 2015 to the plaintiff (exh. P 18 of encl. 28) which expressly referred to the plaintiff's letter of 4 November 2015, explained why it was constrained to call on the BG and also pointed out the plaintiff's various defaults in the completion of the works. More importantly it stated categorically that it had not received any extension of the BG which had been previously extended till 12 November 2015. With the BG expiring round the corner and with the plaintiff expressing in strong language in not wanting or willing to extend the BG, it could hardly be said that D1 was proceeding surreptitiously or that there was something sinister or suspicious in D1's conduct to call on the BG. It was more a case where any negotiations between the plaintiff and D1 had reached an impasse. D1 can hardly be faulted to call on the BG and if only the plaintiff had agreed to extend the BG, D1 would not need to call on the BG, then expiring on 12 November 2015. There was nothing unconscionable in the circumstances in which the call was made.

[31] As was observed by His Lordship Ramly Ali JCA (now FCJ) in the Court of Appeal in *Malaysian Refining Company Sdn Bhd v. Sumatec Engineering And Construction Sdn Bhd* [2011] 7 CLJ 21 at p. 35:

> [37] The respondent also argued that it was unconscionable on part of the appellant to make the call on the bank guarantee when negotiations were ongoing when the demand was issued. The evidence shows otherwise - Negotiations had been unduly prolonged and had reached stalemate. The calling of a bank guarantee under such circumstances, particularly when the expiry date of the bank guarantee is approaching and the negotiations had reached stalemate, cannot amount to unconscionable conduct on part of the beneficiary (the appellant).

[32] D1 had also made payments in advance to the plaintiff as tabled in attachment 2 of the plaintiff's statement of claim which includes the advance payment of RM2,450,000 which was secured by the BG and in respect of which the sum of RM858,476.48 had already been recouped. The total amount advanced by D1 to the plaintiff as at 9 January 2015 as appearing in attachment 2 in the statement of claim is reproduced below:

Ref No	Amount (RM)	Date Received	Remark
ADV-01	2,450,000.00	15-Jul-13	Paid to RE&C
ADV-02	332,983.59	14-Oct-14	Direct Payment to Suppliers
ADV-03	1,833,017.42		Direct Payment to Suppliers

[33] Whilst the RM2.45 million is advance payment pursuant to cl. 19.1 of the contract, the further sums of RM332,983.59 and RM1,833,017.42 were at the request of the plaintiff for it had some cash flow problems and to differentiate it from the advance payment, it shall be called the "payments made in advance". These payments were not due for any works done by the plaintiff but merely to buffer the plaintiff's dire financial condition as it sought to pay its creditors.

[34] Taken in that light the demand by D1 on the BG can hardly be said to be unconscionable. Since the BG was particularly that for securing the advance payment made by D1 to the plaintiff, the demand cannot however be for the whole amount though D1 had indicated that it would be claiming from the plaintiff the sum of RM8.45 million arising out of the failure of the plaintiff to complete both the initial scope of works and the new scope of works. Neither can D1 claim under the BG the two sums being payments made in advance on behalf of the plaintiff. As the BG is for a sum not exceeding RM2.45 million, this court is perfectly entitled to vary the *ex parte* injunction obtained to restrain the payment out by D2 to D1 for the payment in excess of RM1,591,523.52. This is arrived at by taking advance payment made deducting the amount already recouped from the 16 invoices submitted ie, RM2.45 million - RM858,476.49 = RM1,591,523.52. Indeed, going by the plaintiff's own statement in para. 40 of its affidavit in support (encl. 11) of the injunction application, the project was said to have been completed on 15 October 2015 and as contractually the BG for the advance payment must be kept valid for 90 days beyond completion of works and services as found at p. 31 of encl. 11. There was therefore no need to ask for confirmation from D1 that no further extension of the BG would be required as there was the continuing contractual obligation to keep the BG valid until the expiry of the 90 days beyond completion of works and services. The accusation by the plaintiff that D1 would have acted unconscionably and even unjustly enriching itself if it were to ask for further extension or call on the BG was clearly misplaced.

Whether The Non-payment On Invoices 17, 18 And 1 A/W By D1 Are Merely Contractual Disputes And Nothing Unconscionable

[35] At a site meeting on 23 and 24 April 2014 attended by the representatives of both the plaintiff and D1, the fact of delay and slow progress in the works were highlighted to the plaintiff. Both parties signed

A off the minutes of the meeting appearing as exh. P7 in D1's affidavit in reply encl. 23. The particulars of the delay in the said minutes are summarised as follows in D1's affidavit in reply encl. 23 in exh. P4 as follows:

(a) Lack of progress and resources in the past three to four weeks with plaintiff being required to take remedial action;

B

(b) Stacking path to be undertaken in priority;

(c) Cranes engaged by the first defendant/Alstom due to inaction by the plaintiff;

C

(d) Delay led to the plaintiff agreeing to increase manpower by 50 workers by 1 May 2014;

(e) Apart from this a separate team to be engaged for other work;

(f) Another separate team for belt laying activities;

D

(g) Another separate team for stacker reclaimer hydraulic to be confirmed by the plaintiff.

(h) Painting work by the plaintiff also slow and the plaintiff agreed to double its efforts.

E **[36]** In the minutes, D1 expressed their grave concerns over the need of the plaintiff for further financial support from D1. The relevant parts of the minutes signed off by the site manager of D1 and the CEO of the plaintiff read as follows:

3.3 FINANCIAL SUPPORT

F 3.3.1 REC explained their financial difficulties which is preventing them to implement the above recovery plan. They further requested TKI to support them financially by funding RM515,000 so as to enable them (to) make the payment to the manpower agencies and for making the down payment to the new contractor. TKI agreed to support REC by remitting the said amount by next week.

G 3.3.2 REC confirmed that our (*sic*) confidence of generating further financial support from their own sources, further REC confirm that this current financial situation will not recur during the further execution of the project.

H 3.3.3 REC confirmed that apart from the balance payment to the manpower agencies, they have no further creditor currently.

3.3.4 TKI informed that this will be the last time that they will be supporting with such *ad hoc* payment and advised REC not to let such situation recur during the further execution.

I **[37]** D1 explained that all invoices issued by the plaintiff had been duly paid from invoices 1-16. The payment of 80% of the amount claimed is pursuant to the commercial terms and conditions of the contract. As can be seen from the attachment 1 to the statement of claim, there is a deduction

of 10% for the advance payment against each invoice and another 10% being the retention sum. Invoices 8 and 13 do not show any progress of work and D1 had explained that this is a wrong reflection when in reality both sums (RM515,000 and RM284,013) were in fact sums advanced by D1 to the plaintiff due to the plaintiff's financial constrains.

[38] In a letter dated 16 April 2014, D1 wrote to the plaintiff reiterating their continuing concerns over the delays caused by the plaintiff's lack of resources, inadequate mobilisation and non-payments to subcontractors resulting in some works coming to a complete standstill. See exh. P 6 in D1's affidavit encl. 23. This resulted in D1's and Alstom Services having to take mitigating steps to mobilise required resources to ensure good progress. The slow progress can be seen in attachment 1 itself where the percentage of completion with the issuance of each invoice is lamentably low. To compound the problem further, D1 stated that the plaintiff stopped works or abandoned the works some time in late September 2014 without providing any reasons whatsoever. D1 emailed to the plaintiff on 15 October 2014 informing them about the stoppage of work by the plaintiff's workers and requesting the plaintiff's intervention and immediate action to resume the works. There was no positive response to this email exhibited as exh. P8 in D1's affidavit encl. 23.

[39] D1 went on in the same affidavit to state that after abandoning the work some staff of the plaintiff was on site but purely to carry out clearance works and removal of its assets and no work under the contract was being carried out by the plaintiff.

[40] Constrained by the continuous delay caused by the plaintiff culminating in the plaintiff's abandonment of the works, D1 had to revise the scope of works under the contract with the plaintiff with the clear instruction to the plaintiff that should it fail to perform the revised scope of work according to the revised schedule and scope mentioned therein, D1 would be entitled to place orders directly to any other contractor and get the work completed at the cost, expense and risk of the plaintiff. The said letter dated 7 November 2014 from D1 to the plaintiff appears as exh. P9 in encl. 23.

[41] Under para. 1 of exh. P9 D1 wrote to the plaintiff as follows:

> 1. TKI will engage REC's subcontractors directly from 1st November 2014 for the balance work to be undertaken by the individual subcontractors for which REC will have no objection. As TKI will be paying directly to the subcontractors of REC, REC shall not be entitled for these amounts under the abovementioned Work Order. All costs, charges expenses incurred by TKI in addition to the agreed price in the above referred Work Order, the same shall be recovered from REC in whatever manner possible as TKI may deem fit and proper. TKI shall enter into separate contracts with the following subcontractors for the respective scope of work mentioned below: ...

[42] D1 further explained that even after revising the scope and giving opportunity to the plaintiff to undertake the revised scope of works, the plaintiff failed to undertake the revised scope of works and there was no other alternative for D1 but to get the work done through other contractors. D1 in its email dated 22 December 2014 (exh. P 10) informed the plaintiff that such works done through other contractors to minimise the delays and the resultant penalties.

[43] The plaintiff did not dispute that there was delay leading to de-scoping of works and the plaintiff's version of the delay was that it was caused by factors beyond its control including the late delivery of structural material at the site by third parties engaged by D1 resulting in the plaintiff being unable to commence structural works according to schedule. The plaintiff also blamed the delay on inclement weather. The plaintiff contended that it had to do additional works for which the rate had not been specified as it was not within the initial scope of work. See plaintiff's letter to D1 dated 21 November 2014 marked as exh. HKK 14 in the plaintiff's affidavit in support encl. 11.

[44] There is some dispute as to the terms of the de-scoping of the work. The plaintiff contended that it must not exceed the total contract price but D1 contended that it is at the plaintiff's cost, expense and risk. The plaintiff further argued that it had made it clear to D1 by its letter of 7 November 2014 exh. HKK 14 that any reduction and/or de-scoping would be subject to the plaintiff, D1 and the subcontractors first reaching an agreement demarcating the obligations of the various parties in the light of the new scope of works. The plaintiff expressed concern that some of the reduced scope of works included works in respect of which the plaintiff had already carried out substantial works. The plaintiff further took the stand that it had to the best of its ability performed the new scope of works up until February 2015 when for reasons best known to itself, D1 wrongfully and in bad faith restricted or denied the plaintiff access to the project site, preventing the plaintiff from carrying out any further works.

[45] Little wonder that there is now dispute on whether and how much is due to the plaintiff under Invoice No. 17 dated 31 December 2014 with the plaintiff contending that it had completed the works and D1 arguing that the plaintiff had abandoned the works late September 2014. Likewise the non-payment of Invoice No. 18 which D1 said were works done by the subcontractors for which D1 had paid the subcontractors. As for the additional invoice 1 A/W, D1 contended that the works fall under cls. 2.2 and 2.3 of the terms and conditions for services that read as follows:

> 2.2 The Company can vary or alter the scope prior to the Company finalising the engineering of the Equipment and Components. The Contractor shall accept such additions or alterations to the Scope of

Work/Services without any additional cost to the Company/Customer up to 10% of the order quantity. The Contractor shall provide 10 man days (80 man hours) per modification free of cost.

2.3 Any item not mentioned in the Specifications but necessary for completion and achieving the Performance of Equipment and Components for the Project shall be part of the Scope of Services of the Contractor.

[46] These are disputes which are not uncommon in a construction contract where there has been delay in completion. Both sides will have to call their witnesses with respect to the extent and scope of de-scoping and the terms of the new scope of work. Likewise the subcontractors will have to be called to ascertain who did what since there is a dispute. Genuine contractual disputes should not be elevated to the level of unconscionable conduct on the party calling on the BG in the absence of evidence, at the interlocutory stage of an injunction to restrain the call, pointing towards an unfair advantage, or an oppressive conduct or morally reprehensible conduct. It certainly cannot be said, based on the factual matrix so far at this interlocutory stage, that there is a realistic inference of unconscionable conduct on D1's part, as laid down by the Federal Court in *Sumatec Engineering and Construction Sdn Bhd v. Malaysian Refining Co Sdn Bhd (supra)* the test at this interlocutory stage is that of a 'seriously arguable and realistic inference' test which would basically mean establishing a strong *prima facie* case.

[47] In *Sumatec Engineering*'s case *(supra)* the following circumstances were cited as evidence of the alleged unconscionable conduct on the part of Malaysian Refining Co ("MRC"):

[7] ...

(a) there was an agreement in principle reached by the parties for the bank guarantee to be reduced. This was in tandem with the reduction in the scope of works from that originally contracted for between MRC and Sumatec. It referred to the minutes of the meeting between the parties held on 29 October 2009 stating that:

Liability, Warranty and Performance Bond: MRC confirmed that Sumatec could reduce the value of their performance bond in line with a value to be proposed by MRC.

The original contract sum was RM47,846,688. This was reduced to a sum of approximately RM13m.

(b) A provisional acceptance certificate had been issued to MRC for works performed to completion by Sumatec up to 31 May 2009. The certificate certified that the works completed up to 31 May 2009 by Sumatec was in the main accepted as satisfactory to MRC;

(c) MRC had no claims for any LAD for any delay and neither had MRC raised any other complaints/disputes, if at all Sumatec was in default;

(d) there was a one year gap between the date when the completed works was provisionally accepted and the date of the demand of the bank guarantee without any explanation by MRC;

(e) there is clear evidence of a reduction of Sumatec's scope of works under the contract to a region of about RM13m only. Accordingly, the demand on the bank guarantee for RM4,535,255.67 was equivalent to 40% of the value of the actual total contract sum. This amount was wholly disproportionate bearing in mind that the bank guarantee specifically sets the limit of the guaranteed sum at 10% of the contract sum; and

(f) from the minutes of the meeting between the parties, it is evident that the parties had agreed in principle to reduce the value of the bank guarantee to reflect the reduction of Sumatec's scope of works and the reduction in the contract value. Notwithstanding the same, MRC proceeded to make a call on the bank guarantee.

[8] MRC on the other had contended that the bank guarantee was unconditional in nature and on demand in character and thus cannot be restrained from being called and for payment to be made out to it by BIMB.

[48] Based on the above contractual disputes, the Federal Court had no difficulty in agreeing with the Court of Appeal that there was no unconscionable conduct on the part of MRC to call on the bank guarantee. The Federal Court concluded as follows:

[43] In this appeal, Sumatec raised several incidences of the alleged unconscionable conduct on the part of MRC as particularised earlier in this judgment. These are factual matters which have been carefully evaluated and answered below in the Court of Appeal (see paras 32-38 of the Court of Appeal judgment). *The learned judges rightly concluded based on the materials before them, that unconscionability had not been proven to maintain the injunction granted below. We defer to these findings of facts by the Court of Appeal. We cannot find any reasons to justify an interference with the appellate judges' exercise of their discretion to set aside the injunction*. It is unnecessary for us to add, minus or expand on the reasons given by the Court of Appeal to its negative finding of unconscionability on the part of MRC. We also agree with the Court of Appeal that the balance of convenience favoured refusal of the injunction. (emphasis added)

[49] The plaintiff said it has a claim against D1 for unpaid invoices amounting to RM4,632,155 made up as follows as alluded to in paras. 34.1 and 35 of the plaintiff's affidavit encl. 11:

Un-paid Invoices:

(a)	Invoice 17	- RM264,953
(b)	Invoice 18	- RM521,997
(c)	Invoice 1A/W	- RM3,845,205
	Total	RM4,632,155

[50] The plaintiff at the same time acknowledges that there is a sum of RM3,757,524.53 from monies advanced by D1 as set out in para. 34.2 of the plaintiff's affidavit encl. 11 as follows:

(a) Balance Advance Payment		
not recouped	-	RM1,591,523.52
(b) ADV-2	-	RM332,983.59
(c) ADV-3	-	RM1,833,017.42
Total		RM3,757,524.53

[51] D1 on the other hand had indicated to the plaintiff that it had incurred an additional sum of RM8.45 million to complete the project as a result of the delay occasioned by the plaintiff and the need to engage the subcontractors at a higher costs.

[52] Whether or not the plaintiff and D1 could recover their respective claims have to be resolved by arbitration or litigation. For the moment based on a conflict of affidavits evidence from both the plaintiff and D1 on critical issues of cause of delay, extent of de-scoping of the initial scope of works, whether it was the plaintiff or the subcontractors who have done the work in invoice 17 and 18 and whether the plaintiff can claim under invoice 1 A/W for additional work done, are matters for the resolution at the trial of this action as to the plaintiff's main relief which is a declaration that D1's call on the BG is tainted with unconscionability and thus unlawful and for damages to be assessed.

[53] For the moment the plaintiff has not discharged its burden of showing that *prima facie* it is unconscionable for D1 to call on the BG which this court is of the view should be limited to an amount not exceeding RM1,591,523.52 being the amount not recouped from the advance payment.

Where Does The Balance Of Convenience Lies?

[54] Assuming for a moment and for the sake of argument, that there is a *prima facie* case of unconscionability, where then does the balance of convenience lie? The exercise to be undertaken has been laid down in *American Cyanamid Co v. Ethicon Ltd* [1975] 1 All ER 504 at p. 509 where the House of Lords held:

> The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his rights for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be

A adequately compensated under the plaintiff's; undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where 'the balance of convenience' lies.

[55] The plaintiff contended that D1, though incorporated locally, is a B company controlled from India, being a wholly-owned subsidiary of a foreign entity based in India and that the instruction of D1 to the bank D2 is for the sum of RM2.45 million to be paid to D1's office in Pune. The plaintiff said that it was not in a position to ascertain the extent, if any of D1's assets in Malaysia. D1 has a paid-up capital of RM500,000.

C **[56]** This is a case where in all fairness, the fact that D1 is a foreign entity providing a service here, should not be a penalising factor especially when by the plaintiff's own admission a total sum of RM3,757,524.53 had been advanced to the plaintiff by D1. The plaintiff having enjoyed the benefit of the advance payment and the payments made in advance cannot now argue D that their lack of known assets within jurisdiction would tilt the balance of convenience in the plaintiff's favour. The plaintiff would have known of D1 as a locally incorporated company wholly owned by a foreign entity from a company search with the Companies Commission of Malaysia. There was no problem for the plaintiff then to accept the fact of D1 retaining 10% of E every invoice for the purpose of the retention sum which payment it is entitled against the provision of a bank guarantee for the value of the last 10% of the order value which was to be valid up to 30 April 2018 as provided for under the contract. The plaintiff has not provided this bank guarantee which would mean that the plaintiff is content to have D1 retaining this 10% of the order value until the retention period is over. The plaintiff had not F complained then; it cannot be heard to complain now as saying that D1 may not be able to pay the plaintiff should the plaintiff succeed at trial.

[57] At any rate there would be correspondingly the retention sum of 10% that D1's client Alstom Services would have exacted from D1 and the G monies due to Alstom Services for the completion of the project. The fact that D1 could finish the works and hence to complete the project would mean that it has the financial resources for it and certainly not a fly-by-night operator.

[58] If the plaintiff is still anxious, that can be attended to by ordering that H the amount of RM1,591,523.52 to be released by D2, be released to the solicitors' clients' account of D1's solicitors herein and the same be kept in an interest-earning account as stakeholders until the disposal of this suit.

It is not for the plaintiff to contend that the granting of the injunction would not cause any prejudice to D1 as the monies under the BG are secured with I D2. It is sufficient to say that not being able to receive the monies that D1 is rightly entitled to in its effort to recoup the balance of the advance payment is clearly a prejudice which monies if received, could be channelled to other projects that it is working on.

Pronouncement

[59] In the light of all the factors considered above, the *ex parte* injunction is varied such that D1 is restrained from receiving from D2 a sum exceeding the sum of RM1,591,523.52 from the demand it made on the BG and that D2 be correspondingly restrained from so releasing. The sum of RM1,591,523.52 shall be released to D1's solicitors on record as stakeholders and the same shall be placed in the clients' account of the said solicitors earning interest until the disposal of this suit.

[60] For completeness it should be added that throughout the hearing of the application, Miss Nabila Kamaruddin for D2 took a neutral stand and indicated that D2 shall abide by the decision of the court. Costs shall be costs in the cause.

[61] When this decision was made on 24 February 2016, Mr John Skelchy for the plaintiff had asked for an interim stay of this order until the filing of a formal application by the plaintiff for a stay of the order by Monday 29 February 2016. Mr AS Gill had no objection to a temporary interim stay pending the filing of the application and its disposal. The court therefore granted a temporary stay of the order.

***Erinford* Injuction In Enclosure 34**

[62] The plaintiff subsequently on 26 February 2016, filed a Notice of Appeal to the Court of Appeal against the above order and proceeded to file an application to maintain the *status quo* between the parties pending the disposal of the appeal in the Court of Appeal. Effectively it is an *Erinford* injunction application as the application is for an injunction to restrain D1 from receiving and/or dealing with any money from the call on the BG until the disposal of the Appeal including a sum up to RM1,591,523.52.

[63] The power of the court in granting an *Erinford* injunction has been clearly spelled out in the case that bears its name in *Erinford Properties Ltd v. Cheshire County Council* [1974] 2 All ER 448 at p. 454 where Megarry J sagaciously and succinctly states the principle as follows:

> I can see no real inconsistency in any of these cases. The questions that have to be decided on the two occasions are quite different. Putting it shortly, on a motion the question is whether the applicant has made out a sufficient case to have the respondent restrained pending the trial. On the trial, the question is whether the plaintiff has sufficiently proved his case. On the other hand, where the application is for an injunction pending an appeal, the question is whether the judgment that has been given is one on which the successful party ought to be free to act despite the pendency of an appeal. One of the important factors in making such a decision, of course, is the possibility that the judgment may be reversed or varied. Judges must decide cases even if they are hesitant in their conclusions; and at the other extreme a judge may be very clear in his conclusions and yet on appeal be held to be wrong. No human being is

> infallible, and for none are there more public and authoritative explanations of their errors than for judges. A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognise that his decision might be reversed, and that the comparative effects of granting or refusing and injunction pending an appeal are such that it would be right to preserve the status quo pending the appeal. I cannot see that a decision that no injunction should be granted pending the trial is inconsistent, either logically or otherwise, with holding that an injunction should be granted pending an appeal against the decision not to grant the injunction, or that by refusing an injunction pending the trial the judge becomes *functus officio* quad granting any injunction at all.

[64] The above passage and the principle that it enunciated have been cited with approval by our Federal Court in *Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals* [2008] 2 CLJ 1; [2008] 2 MLJ 147.

[65] The plaintiff stated that the test should be that, if the appeal is successful, it should not prove to be nugatory in that the act or the execution of the act in calling upon the BG would have been acted upon, with the result that the sums guaranteed which this court had allowed to be released, would have been released to the detriment of the plaintiff. As authority for this proposition, the case of *Cobrain Holdings Sdn Bhd v. Expertise International A&I (M) Sdn Bhd & Ors* [2015] 6 CLJ 312; [2015] 11 MLJ 339 was cited where at pp. 326 (CLJ); 357 (MLJ) Justice Mary Lim J (now JCA) observed as follows:

> [54] After hearing all parties, I granted the order. The second defendant has now filed an appeal against that grant of an *Erinford*-type of injunction.
>
> [55] The legal principles for such an order are settled in the Federal Court decision of *Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals* [2008] 2 CLJ 1. The test being that 'when a party is appealing, exercising his undoubted right of appeal the court ought to see that the appeal, if successful, is not nugatory'.
>
> [56] It cannot be denied that while the application for an interim injunction to restrain a call on the BG or to receive the benefits under the BG has already been dismissed, the Court always retains jurisdiction and power on the matter of stay or, in suitable cases, a grant of what is known as an *Erinford*-type of injunction. The plaintiff here has submitted that the appeal will be rendered nugatory because of the matters mentioned in paras 7 and 10 of the affidavit filed in support. At para 7, the plaintiff claims that the appeal will be rendered nugatory because the monies would be released by the third defendant to meet the call by the second defendant. As for para 10, the plaintiff claims that it will be prejudiced by the refusal to grant the injunction because damages will not be adequate. The plaintiff's other banking facilities will also be affected if the BG is paid up.

[57] Although the consequence of a call may be in the terms and extent as described by the plaintiff, and it may well have been aware or taken to have been aware and agreed to such consequences when providing the BG in the first place, that does not necessarily mean that where the plaintiff has failed to secure an interlocutory injunction to stop such a call, an *Erinford* injunction cannot now be ordered; and that the plaintiff must simply wait till the appeal is resolved. The second defendant has argued that the appeal can still proceed but the second defendant must be allowed to proceed with the call and the third defendant to pay against the call. If the Plaintiff succeeds, the second defendant will just refund any or all monies received; and it is financially sound to make such refunds.

[58] With respect, the Court disagrees.

[59] The matters that lie at the heart of the interlocutory application and the substantive issues in the writ relate substantively to the same complaints; that there is unconscionability and conspiracy on the part of the first and second defendants in the manner already detailed above such that the second defendant's reliance and call on the BG is unconscionable and must be restrained. The whole object of the application and the writ is really the same and that is to restrain the call and/or the execution of such a call, if one has already been made; and that is what has happened here. That application has been refused. It is obvious that by the time the appeal against that refusal is heard, if there is no injunction ordered pending appeal, the call already made by the second defendant will have to be abided by and met by the third defendant. The focus of the injunction is on the call and the execution of the call; and not on the repayment. The appeal will certainly, in those circumstances be rendered academic and nugatory.

[60] Furthermore, in the interests of justice and balancing the additional facts that the hearing of the substantive case has already been fixed for 12 August 2015; and that the BG is valid until 2017, there is greater urgency and reason to grant the *Erinford*-type injunction in the present facts.

[61] The Court will therefore grant the orders sought in prayers (i) and (ii) till the hearing of the substantive case before the High Court or the appeal by the Court of Appeal on the plaintiff's appeal in relation to the dismissal of encl 3, whichever is earlier; on the undertaking as given by the plaintiff; with liberty to apply and with no order as to costs.

[66] This court does appreciate that a call on the BG and the execution of the call cannot be reversed in the event that the plaintiff is successful on appeal and that an injunction is granted to restrain the execution of the call. By then the horse would have bolted so to speak and the BG would have been exhausted. The sum secured would have been paid out. From that perspective it can be said that the appeal if successful would be nugatory and that the plaintiff's victory upon a successful appeal would be pyrrhic and purely academic save for damages for a wrongful call on the BG.

[67] However this court is not comfortable in confining the fact of nugatoriness to the act of call and the release of the sum secured that cannot be reversed. In a very real sense, all injunctions are about restraining a defendant from doing a particular act or compelling a defendant to do a particular act. The fact that an act that is sought to be restrained cannot be reversed if not restrained and that conversely an act that is mandated cannot be undone if not restrained, does not invariably mean that pending appeal, the *status quo* should be preserved merely because on appeal the injunction might be granted. Otherwise all injunctions restraining an act from being done would suffer the same fate in that though it is dismissed on application, it has to be invariably granted on an *Erinford* application pending appeal, much to the chagrin of the successful party at first instance.

[68] The fact that the act restrained or compelled cannot be undone once it is done is of course unarguable. What is more significant and substantial is really what is behind the act. In the case of a BG, there is nothing sentimental or sacred about it. It is the sum secured that is the substance of it. Hence the question of whether the appeal, if successful, would be nugatory, must be viewed holistically by asking if the sum released may be recovered.

[69] Here the sum is ordered to be paid to D1's solicitors pending the outcome of the trial. Hence, there is little doubt that if the plaintiff is successful after the trial to prove that the call on the BG had been wrongly made and that it was unconscionable in the circumstances of the case, the plaintiff would in this case, be able to recover its money still and also be entitled to damages to be assessed. The same applies to an appeal from the above decision of this court on the dismissal of the injunction application to restrain the call on the BG.

[70] The factor that if the appeal is successful it should not be nugatory, is only a factor that the court in an *Erinford* injunction application, should take into consideration. There are other equitable factors that should bear upon a court granting what is generally an equitable relief. If it can be shown that an applicant had acted inequitably or unconscionably then the court would not grant the *Erinford* injunction. So too if the balance of convenience does not tilt in favour of the applicant or that damages would be an adequate remedy.

[71] Megarry J in the *Erinford Properties Ltd*'s case *(supra)* was careful to clarify as follows immediately after the proposition of law laid down for granting an *Erinford* injunction at p. 454:

> There may, of course, be many cases where it would be wrong to grant an injunction pending appeal, as **where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid, and so on**. But subject to that, the principle is to be found in the leading judgment of Cotton LJ in *Wilson v. Church (No 2)*[1], where, speaking

of an appeal from the Court of Appeal to the House of Lords, he said, '**when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory**'. That was the principle which Pennycuick J applied in the *Orion* case[2]; and although the cases had not then been cited to me, it was on that principle, and not because I felt any real doubts about my judgment on the motion, that I granted counsel for the plaintiffs the limited injunction pending appeal that he sought. **This is not a case in which damages seem to me to be a suitable alternative**. (emphasis added)

[72] In *Cocoa Processors Sdn Bhd v. United Malayan Banking Corp Bhd & Ors* [1989] 1 CLJ 183; [1989] 1 CLJ (Rep) 436 the plaintiff owed the first and second defendants quite a substantial sum of money secured by a debenture. Upon default receivers and managers were appointed over the properties and assets of the plaintiff. The plaintiff claimed for damages for wrongful appointment of the receivers and managers. The plaintiff's application for an injunction to restrain the defendants from disposing, selling and dealing with its assets pending trial of the action was dismissed. The court held that there was no serious issue to be tried. Pending appeal to the Supreme Court then, the plaintiff applied for an *Erinford* injunction to preserve the *status quo*. In refusing the *Erinford* application, His Lordship Mohamed Dzaiddin J (as the former CJ then was) opined as follows at p 439:

... I am of the view that whether or not the plaintiff succeeds in the appeal and in the main action will not be affected by its failure to obtain this further interim injunction. It must be remembered that the plaintiff's claim against the defendants is for damages for wrongful appointment of receivers and managers. The 1st and 2nd defendants being a commercial and merchant bank respectively will no doubt satisfy any money judgment ordered by the Court. Therefore, responding to Mr Bala's fear and anxiety on behalf of the plaintiff, **I must say quite confidently that there is no likelihood of a successful appeal against my decision being rendered nugatory**.

Secondly, **a more serious issue to be considered here is the balance of convenience**. Based on the facts and circumstances of the present case, I find the balance of convenience lay in favour of the injunction pending appeal being refused. I accept the submission of Miss Solomon that the assets of the plaintiff company had depreciated and the longer it remains in its present position, the greater the hardship being inflicted on the defendants. Further, in the event the plaintiff's claim being dismissed, the assets having been depreciated quite considerably, the defendants may not be able to reap the fruits of their success under the debentures. On the other hand, should the plaintiff succeed in its claim ultimately, for damages, the defendants will have no difficulty in settling the judgment.

Lastly, I agree with Tunku Alina that in the present case damages seem to be a suitable and adequate remedy. The plaintiff would be adequately compensated in damages for the temporary damage between now and the date when its appeal is heard if my decision is reversed by the Supreme Court. (emphasis added)

[73] As is evident above, the issue of nugatoriness was considered from the broader perspective of whether the banks as defendants could satisfy any judgment that may be granted in the plaintiff's favour and not so much that the plaintiff's assets having been sold, cannot be reverted back to the plaintiff.

[74] Likewise in *Kilang Kosfarm Sdn Bhd v. Kosma Nusantara Bhd (No.* 2) [2002] 3 CLJ 165; [2002] 5 MLJ 662, the plaintiff had failed in its application for an injunction compelling the defendant to surrender vacant possession of the defendant's land to the plaintiff and to restrain the defendant from interfering and obstructing the plaintiff in carrying out its obligations under the "Oil Palm Operation and Maintenance Contract". The main reliefs in the writ action was a declaration that the defendant had wrongfully repudiated the said contract for no reasonable cause and damages to be assessed and for accounts inquiry into the fruits harvested. In dismissing the plaintiff's application for an *Erinford* injunction application, His Lordship Ramly Ali J (now FCJ) set out his reasoning as follows at p. 174:

> In order to assist me in exercising my discretion on this matter, it is pertinent to see that there would be no impediment to the plaintiff enforcing any judgment in its favour should the plaintiff succeed in its intended appeal as well as the main writ. **Whether a successful appeal by the plaintiff against my earlier decision being rendered nugatory or not, we have to go back to the plaintiff's claim against the defendant in its writ and statement of claim**. I have scrutinised all the prayers in the plaintiff's statement of claim (as listed above) and satisfied that whether or not the plaintiff succeeds in the appeal and in the main action will not be effected *(sic)* by its failure to obtain the present *Erinford* injunction. *There would be no impediment to the plaintiff enforcing any judgment in its favour should it succeed in its appeal and ultimately in its writ. There is no evidence to show that the defendant, would be in no position financially, to honour the judgment obtained by the plaintiff. Therefore, I must say quite confidently that there is no likelihood of a successful appeal against my decision being rendered nugatory*. (emphasis added)

[75] Whilst this court is not so convinced that the appeal if successful would be nugatory for the reason that the sum allowed to be released pursuant to the call on the BG has to be retained by D1's solicitors, this court would proceed to consider where the relative convenience and hardship or prejudice would lie. It cannot be gainsaid that the call having been made before the expiry of the BG, the monies as may be determined by court to be released, will be released either now to D1's solicitors or to D1 after the trial of the suit. In that sense, it is only a matter of time for D1 to receive the money, as may be held by court, that it is rightly entitled. It is only a matter of when it will receive the money secured if it is entitled to receive it. Any damage suffered can be attended to now by making an order as to payment of interest for the time when the money is still held by the Bank D2. There is also the retention sum of 10% of the order value amounting to RM858,476.48 which would only be released after the plaintiff has furnished a bank guarantee for the value of the last 10% of the order value which is

to be valid up to 30 April 2018. The project has been completed and what is required is the finalisation of the accounts. D1 in its call on D2 to pay had given the bank instruction to make direct payment to its branch in Pune, India. There is a danger that cannot be ignored altogether that upon finalisation of accounts all surplus money might be remitted to D1's parent company in India.

[76] However with respect to the plaintiff, its financial position would have been altered significantly in that once the money is released, it would have to furnish the relevant security to the bank for currently, the security is in the form of a corporate guarantee from its parent company. It would even have to come up with the full sum as may be required by the bank. The hardship and prejudice to the plaintiff cannot be dismissed as inconsequential or that it should have known about this when it received the advanced payment and furnished the BG. The reality of the situation is that the change in the plaintiff's financial standing is no small matter whereas for D1, the situation cannot be worse or better save that there is the interest element to be attended to if payment is not made now but later. Both sides have not proceeded with any arbitration; the plaintiff on the sum of RM4,632,155 which it said is due to it from D2 for invoice 17,18 and 1A/W and D1 on the sum of RM8.45 million being the extra costs incurred in getting the subcontractors to complete the work order. The plaintiff further had acknowledged that a sum of RM3,757,524.53 is owing to D1 from the balance of the advance payment of RM1,591,523.52 and the two payments made in advance to it of RM332,983.59 and RM1,833,017.42.

[77] Weighing the respective factors in the scale of balance of convenience and seeing that the trial is just round the corner in the first week of June, which is hardly three months away, the court would be inclined to maintain the *status quo ante* and to grant the *Erinford* injunction subject to terms. The *Erinford* injunction would be until the disposal of the appeal or the disposal of the trial of this case whichever is earlier.

[78] The plaintiff shall pay interest from 11 November 2015 (the date of call on the BG) to the date of disposal of trial or of the appeal whichever is earlier at the rate of 5% per annum to D1's solicitors and the first payment, calculated until the 31 March 2016, shall be paid to D1's solicitors as stakeholders by 31 March 2016 and the balance shall be on a monthly basis. Costs shall be costs in the cause.